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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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Dwight P. Morejohn

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EXAMINER

MAI, HAO D

ART UNIT

PAPER NUMBER

3732

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DELIVERY MODE

11/02/2009

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/748,733	Applicant(s) MOREJOHN ET AL.	
	Examiner HAO D. MAI	Art Unit 3732	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 15 July 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,2,11,13-30 and 44-48 is/are pending in the application.
- 4a) Of the above claim(s) 2,16-19,21 and 23-30 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1, 11, 13-15, 20, 22, 44-48 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--------------------------------------------------------------------------------------|-------------------------------------------------------------------|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 102

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. **Claims 1, 44, and 46-47, are rejected under 35 U.S.C. 102(b) as being anticipated by Koros et al. (5,908,382).**

Regarding claim 1, Koros et al. disclose a retractor 10 (Fig. 1) capable of providing transabdominal access, comprising upper spreader portion 28 and lower spreader portion 16; wherein the spreader portions are positioned relative to each other that they are capable of opening the incision 90 and producing a substernal space for access to the heart (Fig. 1). The upper spreader portion 18 is capable of lifting the sternal area and comprising a hook 52 mounted to a retraction mechanism 28 comprising a screw 58 via a swivel 48 (Figs. 1-2; column 3 lines 2-5). The lower spreader portion comprising a depressor surface 15 capable of engaging the diaphragm and abdominal organs to depress the abdomen at the incision. As to the newly recited limitation, note that the retractor 10 further comprises first side member 14 and second side member 18 interconnecting said upper and lower spreader portions 28, 16, at first and second end portions of said upper and lower spreader portions, respectively.

As to claims 44 and 46-47, the depressor surface is shown to have a tongue depress-like structure. The first and second side members 14, 18, are rigid and each by itself has a fixed length, and they are capable of fixing, e.g. when locked, a distance between locations where each said side member connects to said upper and lower spreader portions. Furthermore, the

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side members and portions of said upper and lower spreader portions are integrated, i.e. essential parts forming a whole, into a shell. Note that the claim language "shell" is given its broadest reasonable interpretation since it is not defined in the specification nor given any specific structural limitation(s) in the claim.

3. Claims 11, 13-15, 20, and 45, are further rejected under 35 U.S.C. 102(b) as being anticipated by Santilli et al. (6,099,468).

Regarding claim 11, Santilli et al. disclose a transabdominal access system 10 comprising: an upper spreader portion 46 and a lower spreader portion 82 being positioned relative to each other to produce a substernal space (Figs. 1-2). The upper spreader portion 46 includes a pair of hooks 78 and 80 each having a free end portion independent of the other and capable of lifting the patient's sternal area. Each of said free end portions of said pair off hooks having a free end. The lower spreader portion 22 comprises depressor surface 82 that can positioned to underlay the pair of hooks (by adjusting bar portion 22 along bar 24 towards bar 20). The depressor surface 14 is capable of engaging the diaphragm and abdominal organs and has a free end portion. Note that the depressor surface 82 and rods 84 can be adjusted so that each of their most-distal free ends extends a substantially same direction relative to each other.

As to 13-15, each of the pair of hooks 78, 80, comprises a lifting surface capable of lifting a patient's sternal area. Also note the first and second side portions (bars 20 and 22) can be positioned and configured between upper and lower spreader portions; the first and second side portions 20, 22, are integrally, i.e. forming a whole or one piece, connected to the upper and lower portions.

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As to claim 20 and 45, the upper spreader portion 46 comprising a retraction mechanism 54/66 capable of lifting the rib cage by adjusting the rods 84 of hooks 78 and 80; and the depressor surface 82 both having a tongue depressor-like structure (Figs. 1-2).

Claim Rejections - 35 USC § 103

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. **Claim 22 is rejected under 35 U.S.C. 103(a) as being unpatentable over Santilli et al. in view of Jascalevich (3,710,783).**

Santilli et al. disclose the invention substantially as claimed according to claim 11. Santilli discloses sliding the rod 84 through a bore knob 66 in order to retract the hook 78. Therefore, Santilli et al. fail to disclose the upper spreader portion comprising a screw mechanism for lifting and retracting (claim 22). Jascalevich discloses a retractor rod D comprising outer threads for adjusting the rod through knob 62 which has internal mating threads as a retracting and lifting mechanism (Fig. 1; column 7 lines 13-26). It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Santilli et al. by substituting the sliding mechanism between the rod and bore knob with the screw adjustment mechanism taught by Jascalevich as a suitable alternative retracting and lifting mechanism that would result in predictable results.

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6. Claim 48 is rejected under 35 U.S.C. 103(a) as being unpatentable over Koros et al. in view of Hu et al. (6,283,912).

Koros et al. disclose the invention substantially as claimed except for the rigid shell being polymeric. However, it is well known to make retractor from rigid polymeric material. For example, Hu et al. disclose a surgical retractor made from rigid polymeric material (column 3, line 15). It would have been obvious to one having ordinary skill in the art at the time the invention was made to make the side members, upper and lower spreader portions that formed a shell from rigid polymeric material since it has been held to be within the general skill of an artisan to select a known material on the basis of its suitability for the intended use. *In re Leshin*, 125 USPQ 416.

Response to Arguments

7. Applicant's arguments filed 07/15/2009 have been fully considered but they are not persuasive and/or moot in view of new ground(s) of rejection. The amendments to claim 1 to recite further structural limitations "first and second side members" have failed to overcome Koros et al. as Koros et al. also teach of first and second side members 14, 18 interconnecting the upper and lower spreader portions. See rejection above.

As to Santilli, Applicant argued that Santilli does not disclose "upper" and "lower spreader portions 46 and 82; and that there is no support for adjusting the surface 82 to underlay the pair of hooks 78 and 80 by adjusting bar portion 22 along bar 24 towards bar 20. The Examiner maintains that Figure 1 of Santilli clearly shows that spreader portion 46 as a whole (rods 48, 84, and adjustment mechanisms 54) is located in an upper position relative to the tongue-like blade spreader portion 82. Furthermore, Santilli explicitly teaches that the bar 22 is adjustable along bar 24 (column 3 lines 3-10). If desired or needed, the surgeon certainly can adjust the bar 22 along bar 24, and position the blades 82, 78, and 80, so that the blade 82

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is underlying the blades 78, 80. Such positions of the blades are possible without interfering each other since the “lower” blade 82 is designed to have a shape that retracts by pressing down while the “upper” blades/hooks 78, 80, are designed to retract by hooking and lifting up tissue.

Conclusion

8. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a). A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

9. Any inquiry concerning this communication or earlier communications from the examiner should be directed to HAO D. MAI whose telephone number is (571)270-3002. The examiner can normally be reached on Monday-Friday. If attempts to reach the examiner by telephone are unsuccessful, the examiner’s supervisor, Cris Rodriguez can be reached on (571) 272-4964. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

10. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private

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PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

**/Hao D Mai/
Examiner, Art Unit 3732**

/Cris L. Rodriguez/
Supervisory Patent Examiner, Art Unit 3732